

MINUTES OF SEPTEMBER 23, 2005, NYSBA CPLR COMMITTEE MEETING AT ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (12-3:30 P.M.)

MEMBERS PRESENT: David L. Ferstendig, Matthew J. Morris, Sourisn Israelzyan, Christian Gannon, Ron Kennedy, Allan Young, Raymond Bragar, Harold Obstfeld, Dew Smoley, David A. Stein, Sharon Stern Gerstman, Paul Aloe, John McConnell, Elliot Blumenthal, Jim Gacioch, Matthew Kreinces, Charles R. Jacob, III, Steven Sonkin, Maurice Chayt, Lucy Billings, Steven Critelli, Rob Knapp.

BY PHONE: Paul McCormack, Pat Connor, John Jablonski.

The meeting was called to order at 12:30 p.m.

I. APPROVAL OF MINUTES

Motion to approve the minutes of the April 8, 2005, meeting was unanimously passed.

II. OPENING REMARKS.

The new Chair, David L. Ferstendig, made his opening remarks at his first meeting as the Chair of the Committee. Everyone welcomed David as the new Chair.

III. AGENDA

- A. **Mendon Ponds:** Sharon Gerstman provided a brief history of the matter and the Committee's response. Overall, there is a split between OCA and the Committee on how to approach a fix of the Mendon Ponds decision. Last year, the Assembly and Senate worked with the Committee and put together legislation that passed both houses and was then vetoed by the Governor. He referenced issues that the cure may be confusing relating to the Clerk provisions and possibly binding on the Judiciary. Sharon explained that the Committee went back and attempted to cure these issues, and even reached out to OCA who simply took no position. The re-written legislation passed but was again vetoed by the Governor. The reasons given included a claim of unintended consequences and a recommendation that the issues concerning the Clerks be separated out from the bill. The question was raised as to whether OCA was concerned politically with the Clerk issue. Judge Stallman recommended the Committee sever the issue and prepare two separate bills. Discussion included having the legislation include the authorization that the Clerk designate the place for filing (something that was thought to already be in the current statute) and whether this should be tabled until the January, 2007, meeting. Paul Aloe raised the issue of whether the Clerks had voiced opposition to any of these issues. Judge Stallman's recommendation was passed by unanimous vote. Sharon will do her own survey to determine whether we should put off any further legislation at this time or perhaps break it into two bills.
- B. **Service on an Out of State Attorney:** Sharon reported on this issue and included a number of different options to remedy how to serve an attorney who does not have an address within this State while handling an action pending within the Courts of this State. Debate raged over the different alternatives that included e-mail service as well as fax service. Everyone agreed as to the e-mail filing but there was discussion about the viability of fax filing. Steven Critelli argued that fax filing was more reliable because you can obtain a confirmation, however, e-filing can include requiring an automatic return receipt when the receiver has gotten the e-mail (although the recipient can refuse to "acknowledge receipt"). Some who are not as savy and/or computer literate raised concerns over proof of service via e-mail. The Committee voted (11-9) to include this into the CPLR under CPLR 2103(b)(3) but there was no overall consensus on which of Sharon's options to adopt and/or report on. We will continue to take no position on Judiciary Law 470.

IV. SUBCOMMITTEE REPORTS

- A. **Proof of Damages (Chayt):** This deals with CPLR 4533-a. The subcommittee had reviewed the proposal and the majority were in favor of the general changes. This would make it easier to prove medical bills during trial. The subcommittee was restructured to include Chayt, Stallman and Kreinces, to further refine the proposal and report back during a potential telephonic meeting in November.
- B. **Notice in Lieu of Subpoena (Young):** A great deal of discussion was had on this matter again. Issues as to the use of the word “shall,” discretion of the Court as raised by Paul Aloe, and reworking the issue of the geographic jurisdiction of the Court, as raised by Sharon Stern Gerstman were discussed. Questions were raised as to whether to include the Surrogate’s Court and/or Court of Claims in this measure. Alan will re-circulate a revised version by e-mail.
- C. **Class Actions (Obstfeld):** This subcommittee also includes Ray Bragar and Oscar Chase. The government operation rule is still up for debate. Many issues were raised including whether this disfavors class actions against government functions, how to measure attorneys fees, and the economic effect of this on Public Interest counsel. Speakers on this topic from outside the Committee were Scott Rosenberg, and Judge Lucy Billings. Both speakers proposed that counsel fees be allowed. Mr. Rosenberg spoke about the concerns from Legal Aid including the position that this could cripple the public interest bar. Paul Aloe raised the issue of whether a practical effect of fee shifting would be to cause the Legislature to retaliate in some manner and that there is a big difference when seeking counsel fees versus injunctive relief. Ray Bragar raised the specter that this is not a bill for our committee’s consideration; moreover, perhaps the fee issue should be limited to cases brought in good faith. Sharon raised the issue of fees only where the municipality acted in bad faith. Scott will take the issues of good/bad faith back for discussion by those he represented.
- D. **Harris/Allianz (Stallman):** Leave to appeal was granted in June. This revolves around a spilt in the Appellate Division as to whether paying the index number fee is a subject matter jurisdiction defense. The question was raised as to whether we wanted to do anything legislatively with respect to this issue. Sharon raised the issue of the interplay of the e-filing system such that you may have filed but not “paid” yet. Sharon will raise this issue with Amy Vance at OCA.

Respectfully submitted,

Matthew Kreinces, Secretary